

Editor's note: stipulated dismissal with prejudice, sub nom. Lower Tonsina Inc. v. Babbitt, Civ.No. A86-035 (D. Alaska April 18, 1994); See Also Ahtna, Inc. 87 IBLA 283 (1985).

NABESNA NATIVE CORP., INC.
(ON RECONSIDERATION)

IBLA 84-258

Decided September 28, 1984

Petition for reconsideration of the Board's order of January 25, 1984, dismissing the appeal of Nabesna Native Corporation, Inc., for failure to file a timely notice of appeal.

Reconsideration granted; order of January 25, 1984, affirmed.

1. Alaska Native Claims Settlement Act: Conveyances: Native Groups -- Appeals: Jurisdiction

Where a certificate of ineligibility for status as a Native group was not sent by the Bureau of Indian Affairs to the person authorized in the record by the members of a Native group to be their agent for any and all legal effects for the group but was sent instead to a member of the Native group, at an incorrect address, the provisions of 43 CFR 2653.6(a)(6) were not followed, and the certificate of ineligibility was not served on the Native group.

2. Appeals: Jurisdiction -- Notice: Generally -- Rules of Practice: Appeals: Dismissal -- Rules of Practice: Appeals: Service on Adverse Party -- Rules of Practice: Appeals: Timely Filing

Where the record in a case establishes that the person authorized by a Native group to act as its agent had actual notice of a certificate of ineligibility for such group, and that the notice of appeal was not transmitted within 30 days of such notice, the notice of appeal must be dismissed. The timely filing of a notice of appeal is jurisdictional, and the Board has no authority to waive a jurisdiction requirement.

APPEARANCES: Robert M. Goldberg, Esq., Anchorage, Alaska, for appellant; James Mothershead, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for the Bureau of Indian Affairs.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Nabesna Native Corporation, Inc. (Nabesna), has petitioned for reconsideration of the Board's order of January 25, 1984, in which we dismissed the appeal of Nabesna for failure to file a timely notice of appeal. Nabesna asserts that there was no service of the certificate of ineligibility issued by the Bureau of Indian Affairs (BIA) because it had been mailed to an incorrect address and it had not been mailed to the last address of record.

The regulation at 43 CFR 2653.6(a)(6) states that a copy of the certification of ineligibility shall be sent by certified mail to the Native group. The record reveals that the certificate of ineligibility was sent by certified mail to:

Mr. Jack John Justin
Chairman of the Board
Nabesna Native Group, Inc.
Mile 43, Nabesna Road
Gakona, Alaska 99586

and was received at such address by "Brenda M. Herington," who is not further identified in the record.

[1] The address of each of the four members of Nabesna is listed on a computer printout found in the record as Mile 43, Nabesna Road. However, there is nothing in the file that supports Mile 43 as a correct address. Rather, the Native group selection application and other documents, including previous mailings to Nabesna, all list Nabesna at Mile 45, Nabesna Road. It appears that the erroneous address in the computer printout was relied upon in addressing the decision to appellant rather than the information provided by the Native group.

The record also contains a statement signed by all members of Nabesna authorizing Wilson Justin, a member of the group, to be their agent as to "any and all legal effects for the Nabesna Group Corporation." The record shows Wilson Justin to be the only member of Nabesna responsible for sending and receiving Nabesna correspondence. Consequently, Wilson Justin was the addressee of record for the purposes of effecting delivery of the decision under the provisions of 43 CFR 2653.6(a)(6).

We find, therefore, that the regulations were not followed and that the certificate of ineligibility was not served on Nabesna as of the August 17, 1983, date when the certified letter was received by Brenda M. Herington.

[2] The various filings with this Board reflect, however, that Wilson Justin received actual notice of the decision adverse to Nabesna in late October 1983. The affidavit of Wilson Justin, dated February 16, 1984, states: "In fact I learned of the matter from Ahtna [Regional Corporation] in late October. I prepared a statement of position and later authorized Ahtna's attorney to act on our behalf. He made an agreement with BIA to confirm our appeal." The statement in the affidavit of Herbert Smelcer, Chief Executive Officer of Ahtna, Inc., the Regional Native Corporation of the

Nabesna Group, dated February 10, 1984, supports Wilson Justin's representation that he received actual notice of the adverse decision in "late October":

After we received the BIA Nabesna report [by certified mail on August 4, 1983] we forwarded it on to the group for their action. We would only act on their behalf after receiving some sort of signal from them and securing Ahtna Board approval. This did not happen until December.

We sent the report on to Wilson Justin. He is the only person in the group who fully understands what this means. He received it in late October or early November.

Consistent with the foregoing statements, appellant's memorandum in support of its petition for reconsideration states: "In late Fall, Mr. Wilson Justin received a copy of the report from Ahtna, Inc., although to this day neither he nor the group has ever been served [by] certified mail by the BIA as required by 43 CFR 2653.6(a)(6)."

These statements, taken together, establish that Wilson Justin received actual notice of the BIA Nabesna report, which included the certificate of ineligibility and its contents, in late October. "Notice" or "service" of the certificate is also acknowledged by the mailing of a notice of appeal from such certificate on December 30, 1983. See Village and City Council of Aleknagik (On Reconsideration), 80 IBLA 221 (1984) (the presence of a village president and city mayor at a hearing confirmed that they had actual notice of the hearing and that there was no denial of due process as to appellant city and village). Assuming that the late October receipt of the certificate meant October 31 was the first evidence of notice of the BIA decision by Wilson Justin, or even that it was received in "early November," the December 30, 1983, transmittal of the notice of appeal remains untimely. ^{1/} See and compare Estate of Andrew Jackson, 12 IBIA 39 (1983); Estate of Wilma Florence First Youngman, 10 IBIA 3 (1982). The certificate of ineligibility clearly states:

An appeal from this decision may be taken to the Interior Board of Land Appeals in accordance with Title 43, Code of Federal Regulations, Part 4, Subpart E, as revised.

If an appeal is taken, the notice of appeal must be filed in the Juneau Area Office of the Bureau of Indian Affairs, P.O. Box 3-8000, Juneau, Alaska, 99802, within thirty (30) days of the receipt of this decision. Do not send the appeal directly to the Interior Board of Land Appeals. The appeal and case history will be sent to the Board by the Bureau of Indian Affairs. * * *

^{1/} As noted in the Board's order of Jan. 25, 1984, Nabesna's notice of appeal was not received by BIA until sometime in January 1984, exact date unknown. Because the notice of appeal was dated Dec. 30, 1983, which was after the due date for the filing thereof, its untimeliness was certain.

To avoid summary dismissal, there must be a strict compliance with the regulations.

Nabesna requested this Board to supplement the record with a draft letter dated November 25, 1983, from Wilson Justin to the Director of the BIA Alaska Native Claims Settlement Act Office in Anchorage, Alaska. The group asserts that this "letter constitutes an intent to constructive appeal of the decision on Nabesna's status as early as November 23, 1983 and to continue litigation in this matter" (Motion to Supplement the Record at 1). We find that a copy of a draft letter with no evidence that a final version was ever sent or received by the addressee is devoid of any probative value. Further, the substance of this draft letter is BIA's report on Twin Lakes, AA-10437, not BIA's report on Nabesna. The draft letter does not constitute constructive appeal of Nabesna's certificate of ineligibility.

Our previous order, dated January 25, 1984, is modified to comport with the rationale of this order. The conclusion we reach upon reconsideration, however, remains the same. The timely filing of a notice of appeal is jurisdictional and the Board has no authority to waive a jurisdictional requirement. Lynn Dahle, 58 IBLA 73 (1981). By regulation, no extension for filing a notice of appeal may be granted and dismissal is mandatory. 43 CFR 4.411(b).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the Nabesna order of January 25, 1984, is affirmed. 2/

Wm. Philip Horton
Chief Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

2/ In the Board's Apr. 5, 1984, order, Little Lake Louise, Inc., Lower Tonsina, Inc., Slana, Inc., and Twin Lakes, Inc., were granted 30 days from receipt of the Board's decision on this motion for reconsideration in which to file statements of reasons in support of their appeals from BIA decisions issuing certificates of ineligibility to them.